Appeal dismissed. Conviction and sentence confirmed.

Appeal dismissed.

Solicitors: *Halim Ismail & Co.*

TAN CHIN KIM SAWMILL AND FACTORY SDN. BHD. & ANOR. v. LINDETEVES-JACOBERG (M) SDN. BHD. & ANOR.

[O.C.J. (Abdoolcader J.) September 26-28, November 7-9 & 14, 1978, January 16-18 & 23-25, November 13-15, 1979 & March 6, 1980]

[Ipoh — Civil Suit No. 137 of 1977]

Commercial Law — Lease financing for industrial equipment and machinery — Leasing — Guarantee — Machinery delivered — Whether property passes — Breach of contract — Damages — Bills of Sale Ordinance, 1950 — Sale of Goods (Malay States) Ordinance, 1957, ss. 19, 20 & 23 — Companies Act, 1965, s. 108.

Commercial Law — Equipment leasing.

Contract — Breach of contract — Guarantee — Damages — Measure of — Contracts Act 1950, ss. 74 & 93.

In this case the first plaintiff company owned a sawmill and the second plaintiff was the chairman of the company. The first plaintiff company required additional machinery to expand its operations and placed four orders with the first defendant for the supply of the machinery. Payment was stated in the orders to be by leasing to be arranged with a credit corporation. The leasing arrangements with the credit corporation fell through and the first plaintiff company through the second plaintiff then arranged for leasing facilities with the second defendant. It was agreed in effect that the first defendant would sell the machinery to the second defendant which would in term enter into a five year lease of the machinery with the first plaintiff company subject to the first defendant guaranteeing all payments due to the second defendant under the leasing arrangement to be entered into by the first plaintiff company and indemnifying the second defendant against all loss, damage, costs and expenses incurred or suffered and purchasing the machinery on the termination of the lease. The first plaintiff company defaulted in its dues for the lease rentals after making two payments and eventually the second defendant terminated the lease agreement and the first defendant acting as agents for the second defendant repossessed the machinery. The first defendant pursuant to the agreements purchased the machinery and indemnified the second defendant against all loss, damages and expenses incurred in the sum of $527,039.37. The plaintiff sought a declaration (a) that the documents relating to the lease are bills of sale and therefore void under the Bills of Sale Ordinance, 1950 and (b) that the lease documents were a sham and invalid and of no effect. At the trial the plaintiffs indicated that they would not proceed with the claim based on the Bills of Sale Ordinance, 1950. The first defendant counterclaimed for the sum of $415,572.10 that is $527,039.37 which it paid to the second defendant plus $165,660.73 for loss and expenses incurred, less the sum of $277,128.00 realised from the sale of the machinery.

Held: (1) there is no substance whatever in the contention of the plaintiffs that the first plaintiff was at any time the owner of the machinery in question or that the arrangement entered into to provide finance to the first plaintiff was otherwise that what the documents show it to be namely the provision of lease financing to the first plaintiff by the second defendant by way of a lease of the machinery by the latter which had purchased it from the first defendant. The claim of the plaintiffs to the effect that the documents are a sham because they were a device to cover a transaction whereby goods were given as security for a loan must accordingly fail;

(2) in regard to the counterclaim, the second defendant and in turn the first defendant was entitled to recoupment and to recover all loss naturally arising as a result of the breach of contract on the part of the first plaintiff. The first defendant was also entitled to recover for any damages or loss sustained by it beyond what it had to pay to the second defendant under the guarantee.

Cases referred to:-

(1) *Cheetham & Co. Ltd.* v. *Thornham Spinning Co. Ltd.* [1964] 2 Lloyds L.R. 17, 22-23.

(2) *Ginzberg & Ors.* v. *Barrow Haematite Steel Co. Ltd. and McKellar* [1966] 1 Lloyds L.R. 343, 351-353.

(3) *Hadley* v. *Baxendale* (1854) 9 Ex. 341; 156 E.R. 145.

(4) *Ex parte Bishop, In re Fox, Walker & Co.* (1880) 15 Ch. D. 400, 421-422.

(5) *Omnium Insurance Corporation Limited* v. *United London and Scottish Insurance Company Limited* (1920) 36 T.L.R. 386, 387.

(6) *Badeley* v. *Consolidated Bank* (1887) 34 Ch. D. 536, 556.

(7) *Financings Ltd.* v. *Baldock* [1963] 2 Q.B. 104.

CIVIL SUIT.

N.T. Rajah for the plaintiff.

Peter Mooney (*U. Harcharan Singh* with him) for the first defendant.

P.P. Royan for the second defendant.

Cur. Adv. Vult.

Abdoolcader J.: This case which I am told from the Bar is the first of its kind in the country involves lease financing for industrial equipment and machinery and revolves around an allegation by the plaintiffs that the arrangement effected is a sham and invalid and of no effect. Without for the moment meandering through the catacombs of pleadings and evidence, it will be necessary initially by way of background to synoptically outline the facts of the matter to show the arrangement ostensibly entered into and the relationship of the parties in this respect, but before doing so I should perhaps observe that this action which took some 18 days to hear has resulted in a profusion of evidence and entailed pleadings which prior to the hearing had without sanction or consent been amended by the parties of their own accord and filed out of time and therefore necessitating applications at the outset for leave to do so followed by re-amendments and further re-amendments time and again in the course of the trial right up to even the midstream stage of final addresses, and the augmentation of the four bundles of agreed documents tendered in the first instance into six not unbulky volumes as the hearing progressed. This case might therefore perhaps qualify as the first of its kind in another sense as well or at least as a very close runner-up in this field.

The 1st plaintiff company owns a sawmill and carries on this business at Mambang Di-Awan, Kampar, Perak, and Tan Chin Kim, the 2nd plaintiff, was the chairman of the company and virtually its alter ego and voice and mind as he personally handled all matters relevant to this case for and on its behalf and in giving evidence generally and in particular in the use of personal pronouns in effect assumed the mantle of the 1st plaintiff and identified himself with it. The 2nd plaintiff unfortunately died on February 7, 1979 but happily after the completion of his evidence which I had taken steps to expedite because of the terminal illness he was suffering from. His son Tan Way Keat was then substituted to represent his estate for the purposes of this action but I shall continue to refer to the deceased as the 2nd plaintiff who it would seem was probably joined as a co-plaintiff only because of the charges over his own

property to secure the guarantee by the 1st defendant in favour of the 2nd defendant in the transaction that ensued. The 1st plaintiff required additional machinery to expand its operations and as a result placed four orders with the 1st defendant for the supply of some sawmilling machinery and associated equipment, parquetry machinery and a wood-fired boiler on December 4 and 18, 1973 and payment was stated in the orders to be by leasing to be arranged with the Credit Corporation (Malaysia) Berhad ('C.C.M.'). The sawmilling machinery, referred to as the Akimoku machinery ordered from Japan, arrived in Penang in about August 1974 and this comprising six items was then sent to the 1st plaintiff's sawmill in Mambang Di-Awan as the 1st defendant says the items were very large and it had no storage space and in order to avoid extra handling and storage charges. The rest of the machinery was left in the 1st defendant's store in Ipoh except for the boiler which was available for delivery from the supplier in Kajang, Selangor.

Apparently leasing arrangements with C.C.M. did not go through and the 1st plaintiff through the 2nd plaintiff then arranged for leasing facilities with the 2nd defendant, the arrangement being briefly that the 1st defendant would sell the machinery to the 2nd defendant which would in turn enter into a five-year lease of the machinery with the 1st plaintiff subject to the 1st defendant guaranteeing all payments due to the 2nd defendant under the leasing arrangement to be entered into by the 1st plaintiff and indemnifying the 2nd defendant against all loss, damage, costs and expenses incurred or suffered and purchasing the machinery on the termination of the lease. All this was implemented by a series of documents, the first of which was an agreement made on April 25, 1975 between the 1st defendant and the plaintiffs whereby the latter agreed to charge certain properties of theirs in favour of the 1st defendant in consideration of the 1st defendant guaranteeing payments under the leasing arrangement to be entered into by the 1st plaintiff with either C.C.M. or the 2nd defendant in respect of the machinery. Charges and a memorandum of deposit of title deeds were accordingly executed by the plaintiffs between April and August 1976. The directors of the 1st plaintiff passed a resolution on June 1, 1975 authorising the 2nd plaintiff and another director 'to negotiate the lease (of the machinery) from (the 2nd defendant) in first preference to C.C.M. for a period of five years' and for the common seal of the company to 'be affixed to the documents of lease'.

The 2nd defendant wrote on June 2, 1975 to the 1st defendant and the 1st plaintiff setting out the terms and conditions on which they would grant a lease of the machinery and both the 1st defendant and the 1st plaintiff accepted the terms and conditions by confirming this in writing on copies of the letters sent to them. The 1st defendant then sent an invoice to the 2nd defendant for the machinery on June 23, 1975 in the sum of $454,428 which was paid to the 1st defendant on September 13, 1975. A draft lease agreement was sent by the 2nd defendant to the 1st plaintiff on July 11, 1975 for comments and approval. There does not appear to have been any objections to any of the provisions in the draft and the lease agreement for a five-year lease at a monthly rental of $10,990 was duly entered into on September 19, 1975. On the same day the 1st defendant entered into a written guarantee in favour of the 2nd defendant as arranged and also an agreement to purchase the machinery from the 2nd defendant for $45,442.80 on the termination or expiry of the lease entered into with the 1st plaintiff.

The 1st plaintiff defaulted in its dues for lease rentals after making two payments and after some abortive attempts to retrieve the situation the 2nd defendant terminated the lease agreement by a letter dated March 3, 1976, and on the evidence the 1st defendant acting as agents for the 2nd defendant repossessed three items of machinery on November 1, 1976 and the rest on November 8 apart from some steel rails which they removed on November 13. The 1st defendant pursuant to its obligations under the relevant agreements purchased the machinery and indemnified the 2nd defendant against all loss, damage and expenses incurred in the sum of $527,039.37 which was paid on February 11, 1977.

The leitmotiv and indeed mainstay of the plaintiffs' claim was throughout a declaration that the documents pertaining to the lease are bills of sale and therefore void under the Bills of Sale Ordinance, 1950, until the eleventh hour, so to speak, when in the course of the final address by Mr. Mooney for the 1st defendant, Mr. Rajah for the plaintiffs indicated that he is not proceeding with this claim and is abandoning reliance on the Bills of Sale Ordinance as by virtue of the provisions of section 108 of the Companies Act, 1965 the Bills of Sale Ordinance has no application to companies incorporated under the Companies Act, and that he would only be relying on the declaration the plaintiffs seek in the alternative to the effect that the lease documents are a sham and invalid and of no effect. I asked him then out of unmitigated curiosity as to what principle of law he will be applying in this respect and he says he will be relying on equity. I looked forward with increasing interest to elucidation on the parturient propensities of equity in this connection but when it came to submitting on this point in his final address all Mr. Rajah is able to say is that the documents are a sham because they were a device used to cover a transaction whereby goods were given as security for a loan. I must say immediately that there is no specific plea to this effect in the statement of claim and, in any event, even if this were established the effect thereon of section 108 of the Companies Act has not been mooted but I do not think it is necessary for me to be concerned with this aspect. Mr. Rajah says that the documents are invalid because the parties did not intend it to be a true lease. All I need say is that if no question of a bill of sale arises then I cannot look behind the documents and Mr. Rajah is then faced in respect of this claim in the alternative with the statutory evidential bar enacted by the provisions of section 92 of the Evidence Act, 1950. He agrees that there was no fraud or any question of intimidation of the plaintiffs and that the documents are not illegal. He goes on to admit that he cannot honestly say that the case comes under proviso (a) to section 92 of the Evidence Act, and in answer to a specific question I put to him he is unable to say if section 92 of the Evidence Act debars the plaintiffs from submitting that the documents are a sham and do not reflect the true intention of the parties. All the other relief by way of damages,

declarations, orders and an injunction sought by the plaintiffs against the defendants are merely ancillary and sequential to this declaration that they seek. Both the defendants of course join issue with the plaintiffs on their claims and the 1st defendant in turn counterclaims for reimbursement of the moneys they have had to pay to the 2nd defendant and in addition for the loss and expenses they themselves have incurred.

The case for the plaintiffs depends primarily, basically and substantially on the evidence of the 2nd plaintiff as he seeks to controvert the essential documents in this matter which are to the opposite effect, and I think it is necessary to briefly state my impression of him as a witness. I am not going to mince words as I am delivering a judgment and not a eulogy and there is no room for the application of the ancient adage *de mortuis nihil nisi bonum*. I find that he was not beyond embellishing his testimony, was unreliable as a witness and did not hesitate to trim his evidence to meet the plaintiffs' claim. Although he was suffering from a terminal illness, I do not think that his state of health in any material way affected his evidence. He was able to remember things when it suited him to do so. His evidence was not infrequently marked by sporadic displays of uncanalised fluidity; he chopped and changed while testifying on a number of occasions as, for instance, with regard to the installation of the machinery and the difficulties he faced and when he said that he had asked for the other items of machinery which had not been delivered but later said he did not ask for them and then again resiled and said he did ask for them, and when he said that he did tell the 2nd defendant that the 1st plaintiff was the owner of all the machinery but later agreed that at no stage did he claim to the 2nd defendant to be the owner of the machinery. He was also not beyond resorting to downright falsehoods as, for example, in giving evidence with regard to the resolution of the 1st plaintiff made on June 1, 1975 when he said that he had instructions from the 2nd defendant to pass the resolution to the effect that the machinery was leased and not secured by a loan when the 2nd defendant's letter of offer is only dated the following day, June 2, 1975, there are no specimen resolutions attached to that letter of offer and the resolution itself speaks of 'in first preference to C.C.M.' which it is wholly inconceivable the 2nd defendant would have ever suggested. I do not think it unfair in the circumstances to say that his evidence was self-contradictory, full of inconsistencies and improbabilities and totally at variance with his own documents and all the other evidence adduced including the evidence of his own witnesses and also in so many respects not in conformity with his own pleadings.

The statement of claim, and I am referring to the latest amended version of it, does not appear to be congruent with the case for the plaintiffs presented before me. The whole substratum on which the plaintiffs' case rests is the claim of the 1st plaintiff to ownership of the machinery. If they fail in showing this their claim must fail and that would be the end of the matter. It is not specifically claimed anywhere in the statement of claim that the plaintiffs were the owners of the machinery. It states there was an agreement to purchase but no statement that the plaintiffs did purchase and no claim that the sale was actually carried into effect. It claims that the transaction was a device to pay off the purchase price without stating however how the purchase occurred. It states that the ownership never intended to pass but it does not say who was the owner at any time or how the ownership came into being. Before proceeding to consider the relevant aspects of the evidence I should perhaps say that it is not in dispute that in December 1973 the 1st plaintiff placed orders with the 1st defendant for the machinery, that in August 1974 six items of the Akimoku machinery were delivered to the 1st plaintiff's sawmill, that the plaintiffs did not pay the 1st defendant the price for the machinery or any part thereof and that the plaintiffs did not receive any invoice or document of sale when the Akimoku machinery was delivered to the sawmill or at any other time.

The plaintiffs essentially rely on ownership of the machinery in the 1st plaintiff and that the property therein had passed to it when the four orders therefor were placed with the 1st defendant in December 1973 and the 2nd plaintiff repeatedly declared in his evidence that the 1st plaintiff had ordered the machinery and was therefore the owner and that it became the owner on the day the orders were placed. I would reiterate that the four orders clearly state that payment was to be by way of a leasing arrangement. It is certainly not insignificant that no claim was made to ownership until some eleven months after the termination of the lease agreement and yet during this period the 2nd plaintiff was desperately trying to raise funds to retain the machinery as the only means of salvage from financial disaster for the 1st plaintiff but in the course of this he did not even once advance the claim to ownership of the machinery. The 2nd plaintiff's only explanation for this under cross-examination was that he never thought of raising this ownership question until the machinery was repossessed! No such claim was advanced even at the very time of repossession, and it was only some three months after that when proceedings were taken to enforce the charges that this claim to ownership was raised as a defence thereto.

The four orders placed in 1973 are not sale documents and I cannot accept them as constituting ownership. The 1st plaintiff in order to succeed has to prove a sale of the machinery to it in December 1973 and it has not done that and, in any event, even if there was a sale it must be unconditional for the property in the machinery to pass under the provisions of section 20 of the Sale of Goods (Malay States) Ordinance, 1957, and the four orders certainly do not amount to that. For the purpose of ascertaining the intention of the parties as to when the property in goods is to be transferred to the buyer section 19(2) of the Sale of Goods Ordinance provides that regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. I have already said that the orders were placed subject to payment by way of a leasing arrangement and this was admitted by the 2nd plaintiff, and he also admitted that there was no other way for him to get the machinery except by leasing arrangements. Mr. Rajah however contends that the four orders placed constituted a sale of the machinery to the 1st plaintiff

and that the property therein passed to it and relies on the general conditions printed on the reverse of the orders and in particular or paragraph 4 thereof. These conditions however would only apply if the orders amounted to a sale as such but in this case they were subject to leasing arrangements for the provision of finance and moreover Mr. Rajah had perforce to agree that paragraph 11 of those conditions does appear to be in conflict with paragraph 4. Mr. Rajah also relies on the fact that the instruction manual for the installation of the machinery was handed over to the 2nd plaintiff after the orders were placed as a factor showing they amounted to unconditional contracts. I can neither understand nor accept this argument and am unable to see how the handing over of the instruction manual makes a whit of difference to the position.

The next question to consider is whether the delivery of the six items of the Akimoku machinery to the 1st plaintiff's sawmill had the effect of making it the owner. The 2nd plaintiff said that Tham Kong Hai (DW1), a marketing executive with the 1st defendant, told him that the six items when delivered were the property of the sawmill and that he should insure them although later he admitted under cross-examination that at the time of delivery of these items the 1st plaintiff was not in a position to pay for them and had not concluded any financial arrangements. DW1 denied saying any such thing and I believe him as, if it had been otherwise, there would be no reason for the 1st defendant itself to have had to insure the machinery after delivery to the 1st plaintiff's sawmill, and Albertus Jacobus Klijn (DW2), the manager of the engineering division of the 1st defendant in Kuala Lumpur, who produced the insurance policy (L13), explained that the premium for the policy is not included in the 1st defendant's counterclaim because the machinery was the 1st defendant's property at the material time, and also that the insurance was effected from January 1, 1975 due to an oversight in not having had this done earlier. I might digress to point out that when the 1st plaintiff did insure the machinery in August 1975 the insurance was taken out in the name of the 1st plaintiff as 'lessee' and the 2nd defendant as 'owners and leasers (sic)'.

DW1 said that the Akimoku machinery was sent to the sawmill as the 1st defendant had no storage space and to avoid extra handling and storage expenses but that no invoice in respect thereof was given to the plaintiffs and he never told the 2nd plaintiff that the machinery was his property. I accept the reason given by him for the delivery and the 2nd plaintiff himself admitted under cross-examination that the six items delivered comprised ten or eleven substantial crates and had to be put somewhere, and that if the 1st defendant had arranged storage this would have involved storage and double handling charges and that by delivery direct to the sawmill he agreed storage and handling charges would be saved. He also agreed that it was no part of the bargain that the 1st defendant would store the six items until he found finance and that he was given no invoice or document of sale of any kind in relation to the six items save for a delivery order. In contrast however as between the 1st and 2nd defendants there was an invoice which I have already referred to, delivery orders for internal use (L11 and L12) and stock cards to show that the property had passed to the 2nd defendant as the owner of the machinery. DW1 said in evidence that the intention of the 1st defendant in not invoicing the 1st plaintiff when the machinery was delivered was to retain title and that he told the 2nd plaintiff the reason for the delivery was that the 1st defendant did not have enough storage space and also to save the plaintiffs extra handling charges. The 2nd plaintiff denied having been told this but I do not believe him and he had admitted under cross-examination, as I have just said, that the reason given was indeed germane. The delivery order handed over when the six items were delivered to the 1st plaintiff's sawmill is marked "on consignment" and DW1 said that these words indicate that the delivery was not pursuant to any contract and they were in effect intended to reserve the right to disposal on delivery.

I cannot accept Mr. Rajah's contention that section 23 of the Sale of Goods Ordinance applies as there was no unconditional appropriation of the machinery in the circumstances and, as I have already said, I accept the evidence of DW1 that the delivery of the six items was effected for the reason he gave, and even Mr. Rajah admits that if this evidence is accepted the property in the machinery delivered would not have passed to the 1st plaintiff in the light of settled authority that delivery in these circumstances would not result in the property in the machinery passing (*Cheetham & Co., Ltd.* v. *Thornham Spinning Company, Ltd.*[1] (at pages 22-23); *Ginzberg & Ors.* v. *Barrow Haematite Steel Company, Ltd. and McKellar*[2] (at pages 351-353)). The 2nd plaintiff also said that he was told by DW1 to insure the machinery because they then belonged to him. I do not accept this testimony as the 2nd plaintiff had in any event to agree a little later that if the machinery belonged to the 1st plaintiff it would be a matter of indifference to the 1st defendant whether he insured it or not, and again when a little later he repeated that he subsequently insured the machinery against fire and other risks and only did so under instructions from and as required by the 2nd defendant and that he himself considered it quite unnecessary, I thought it a peculiar stance to be adopted by one claiming to be the owner of such valuable machinery.

Mr. Rajah further seeks to rely on the phraseology of some draft proposals by the 2nd plaintiff which were put into writing by the 1st defendant's solicitors on July 17, 1976 and also a "without prejudice" letter of August 3, 1976 from the 1st defendant's solicitors to the 1st plaintiff which he contends suggests in the wording ownership of the machinery on the part of the 1st plaintiff. I cannot agree as at best this would be a matter of loose language used in the course of negotiations for an amicable settlement in an attempt to avoid repossession and does not amount to any confirmation or admission that the property in the machinery was ever vested in the 1st plaintiff. In any event, the sixth paragraph of the draft proposals of July 17, 1976 specifically refers to title to the equipment not passing to the 2nd plaintiff until after full payment but when confronted with this the 2nd plaintiff said that this particular paragraph was drafted by the 1st defendant's solicitors and he accepted it although he had earlier testified that he had himself stipulated in the proposals that the title to the machinery would not pass to him

until after full payment had been made. I must also reject Mr. Rajah's submission that the invoice issued by the 1st defendant on June 23, 1975 in favour of the 2nd defendant in respect of the latter's purchase of the machinery was clearly a false document on the ground that though it states that the goods were to be forwarded by lorry on that day, no goods were in fact delivered then or at any time thereafter. It is true that the machinery was not forwarded to the 2nd defendant or the 1st plaintiff on June 23, 1975 but I accept the explanation given in this regard by DW1 that this was the general style of invoice used when goods were sold from stock and the date would be that of delivery but that in this case it was common knowledge that the Akimoku machinery had already been delivered to the 1st plaintiff's sawmill in August 1974 and therefore the date in the invoice indicated the date of invoicing to the 2nd defendant and did not mean that the goods were forwarded by lorry on that day.

I have previously referred to the fact that the 2nd plaintiff had to agree under cross-examination that at no stage did he claim ownership of the machinery to the 2nd defendant, reneguing an earlier statement to the contrary. He admitted that at the time of delivery of the Akimoku machinery he was not in a position to pay for it and had not concluded any financial arrangements. DW1 said in his evidence-in-chief that he never told the 2nd plaintiff that the machinery was his property and he was not cross-examined on this. I do not believe the 2nd plaintiff's statement to the contrary which is incompatible with what he said to Yang Shu-Yin (DW3), the then corporate finance officer in the investment department of the 2nd defendant involved *inter alia* in the leasing business, who I would say immediately I found to be a delightfully honest and reliable witness. And Sieh Kok Jiun (DW4), the manager of the investment department of the 2nd defendant, also confirmed that the 2nd plaintiff never claimed ownership of the machinery in question and again there was no cross-examination on this aspect. The plaintiffs accepted without any protest or comments the terms of the written offer made by the 2nd defendant in its letter of June 2, 1975 for providing finance by leasing of the machinery, and paragraph 1 of the terms clearly states that the 2nd defendant would purchase the machinery from the 1st defendant. The first mention of the claim by the plaintiffs that they had purchased the machinery appears in their solicitors' letters of February 7, 1977 to the defendants and that claim was predicated on a contention, now abandoned, that the lease agreement was an unregistered bill of sale.

There is then the matter of the machinery not having been included in the fixed assets of the 1st plaintiff's audited accounts. The 2nd plaintiff sought to explain this by saying the machinery was not included because he had not paid completely for it but had to admit, when pressed on this point, that motor vehicles under hire-purchase and not fully paid for had been included as fixed assets. He said that the accounts were prepared by his auditors who had access to all the 1st plaintiff's books and other relevant documents including the lease agreement and admitted that he did not tell the auditor about the ownership of the machinery. The auditor, Wong Sing Ngok (PW2), testified that the 2nd plaintiff did not tell him the 1st plaintiff had purchased machinery worth about $500,000 and said that he was shown the lease agreement but the 2nd plaintiff did not tell him the 1st plaintiff was the owner of the machinery although he did say to the 2nd plaintiff that he needed to know all the assets of the company. PW2 went on to say that if he had been told about the claim to ownership he would have included the machinery as part of the 1st plaintiff's assets and the company would then have been entitled to a twenty per cent depreciation allowance thereon for tax purposes. The 2nd plaintiff was later recalled for further examination on Mr. Rajah's application and said that he was forced by DW3 not to tell the auditor (PW2) that the 1st plaintiff was the owner of the machinery but DW3 denied this in her evidence-in-chief and was not cross-examined on her denial; I have no hesitation whatsoever in branding this allegation by the 2nd plaintiff as a downright concoction. Tan Choon Keat (PW4), a son of the 2nd plaintiff and the supervisor of the sawmill, who was called for the plaintiffs gave no evidence whatsoever on the ownership of the machinery and was not even asked in examination-in-chief who the owner was, a fact which I would have expected him to be well aware of in view of the position he holds. The memorandum (M15) drawn up and submitted by DW3 to the management committee of the 2nd defendant, the authenticity of which there is no reason to doubt, would also appear to completely support the case for the defendants and belie that for the plaintiffs.

I should perhaps now deal with some aspects of the statement of claim in relation to the evidence regarding the claim to ownership of the machinery by the 1st plaintiff. Paragraph 1 of the statement of claim which states that the 1st plaintiff agreed to purchase the machinery is inconsonant with and indeed negated by the documents produced, contrary to all the evidence given by the witnesses for the defendants and the 1st plaintiff's auditor (PW2), not supported by PW4 and against all the probabilities of the case. The evidence discloses the 1st plaintiff was at no stage in a position to purchase the machinery and perhaps according to its audited accounts even to pay a deposit had that been required. The 2nd plaintiff has admitted in evidence that there was no other way to get the machinery except by leasing arrangements. A sale is synallagmatic in nature and connotes as well an agreement to sell on the part of the other party but the 1st defendant never agreed to sell; the four orders placed by the 1st plaintiff were only requests for the supply of the machinery and not a sale, and the 1st defendant made that quite clear at the outset by evincing the intention to lease and not to sell. I have already considered and dealt with the question of delivery of part of the machinery pleaded in paragraph 2. The plaintiffs contend in paragraph 6 that 'the purported sale of the machinery' by the 1st to the 2nd defendant and the leasing by the latter to the 1st plaintiff was merely a device, and that the ownership of the machinery was never intended to pass to either the 1st or 2nd defendant. All I need say is that the failure to establish ownership in the 1st plaintiff must necessarily mean a failure of this and all consequential pleas. I have discussed the ownership question and will presently have to refer to the evidence on the

allegation by the 2nd plaintiff that what he wanted and in fact got was a loan from the 2nd defendant but this again is premised on the assumption of ownership by the 1st plaintiff. Paragraph 7 claiming special damages suffered is entirely dependent on paragraph 6. Paragraph 8 is in fact a defence to the 1st defendant's counterclaim and Mr. Rajah agrees that it should in fact appear in the defence to the 1st defendant's counterclaim.

Now to turn to the allegations made by the 2nd plaintiff in evidence to the effect that what he obtained was in fact a loan for the 1st plaintiff to purchase the machinery. There is of course not a word about the question of loan in the statement of claim and accordingly no foundation therefor in the pleadings. The 2nd plaintiff said that the 1st defendant promised to get the 1st plaintiff a loan to pay for the machinery which it would have to repay by instalments to the lender. He said he was promised this by Mattern, the then manager of the 1st defendant, and DW1 and that they told him the loan would be raised with either C.C.M. or the 2nd defendant. DW1 said that Mattern who was then manager of the 1st defendant had left its employment in about 1975 and he did not know his present whereabouts and DW2 reiterated and confirmed this. Mr. Rajah however informed me in the course of these proceedings that he had been able to trace Mattern and had in fact spoken to him in Amsterdam over the telephone. If that is so I can see no reason why the plaintiffs did not choose to obtain Mattern's evidence as in any event the burden of proof of the allegations made in this regard rests upon them (sections 101, 102 and 103 Evidence Act).

The 2nd plaintiff also said that he was given an assurance by Mattern that after payment of all the lease rentals under the lease agreement the machinery would be his automatically but agreed that he never wrote to have this assurance confirmed. Here again this evidence contradicts the specific terms of the offer made by the 2nd defendant to the plaintiffs in its letter of June 2, 1975. It is clear that if all this evidence is intended to explain the documents before me it is excluded by the provisions of section 92 of the Evidence Act, and Mr. Rajah says he is not relying on any of the relevant provisoes to that section, and if no question of a bill of sale is in issue, and it is not, then it is not permissible to look behind the documents to ascertain the true nature of the transaction. If the evidence of the 2nd plaintiff on these lines is not intended to explain the documents then it is irrelevant, and indeed I should point out that when the 2nd plaintiff in his evidence-in-chief referred to some of the documents and said they were written on the instructions of DW3 to avoid the use of the word 'loan' and objection was taken to this by Mr. Mooney, Mr. Rajah said that he had no instructions and no idea of the answer given by the 2nd plaintiff in relation thereto, a remark I recorded at the express request of Mr. Mooney.

I do not accept the evidence of the 2nd plaintiff that he did not personally contact C.C.M. in the light of the contents of the letter of December 19, 1973 from C.C.M. to him and accept the evidence of DW1 that before the four orders were placed in December 1973 there had been several meetings with C.C.M. held at the request and in the presence of the 2nd plaintiff who wanted from C.C.M. an arrangement for leasing the machinery which was originally suggested by Mattern, that the 2nd plaintiff did not ask C.C.M. for a loan and apart from leasing no other form of finance was discussed; DW1 was never cross-examined on this aspect of his evidence. The 2nd plaintiff later under cross-examination said he could not remember if he had any meeting with the manager or a representative of C.C.M., that perhaps he might have had and if he did this would have been for no other reason than getting credit facilities. The 2nd plaintiff said that he approached the 2nd defendant in March but corrected this later to the latter part of April 1975 when he saw DW3 and was later brought to see DW4. He said that he produced to them the four orders he had placed with the 1st defendant to show that he had purchased the machinery and requested a loan. He said that the word 'loan' was used by DW3 but subsequently she told him when the leasing agreement was entered into that the word 'loan' should not be used and instead the word 'facilities' should be used. The court interpreter informed me that the words 'loan', 'lease' and 'facilities' were used by the 2nd plaintiff in the English language and not the Cantonese dialect in which he was giving evidence. The general tenor of his evidence was that he had agreed with the 2nd defendant to get a loan but that the transaction was concealed under the guise of the documents entered into and all this was done at the behest of DW3. I do not accept a word of all this and as will be seen presently I wholly accept the evidence and denial in this respect of DW3 who as I have said I have found to be a refreshingly truthful witness.

On his own evidence, the 2nd plaintiff had approached Malaysian Industrial Development Finance Berhad which however declined to give him a loan and it was only then that he personally approached the 2nd defendant. The 2nd plaintiff had to agree under cross-examination that on his evidence the 2nd defendant was pretending to purchase the machinery when it was not purchasing at all and that in full consciousness it was pretending to purchase from somebody it knew was not the owner and that in these circumstances it was putting itself in a doubly false position. He pretended not to know if this was an extremely foolish thing for merchant bankers to do but had perforce to agree that these merchant bankers would surely know that if things went wrong the plaintiffs would come to court and divulge these false arrangements. The 2nd plaintiff also had to agree that he was quite prepared to consider hire-purchase, leasing or a fixed loan and that provided he got the finance, he was not particular about the method by which he obtained it and that he, and that embraces the 1st plaintiff as well, was in a very desperate financial position.

I have dealt with the resolution passed on June 1, 1975 by the 1st plaintiff and the reference therein to the negotiation of 'the lease' of the machinery and 'the documents of lease'. The four orders placed by the 1st plaintiff speak of leasing and so does the letter of December 19, 1973 from C.C.M. The 2nd plaintiff said under cross-examination that he took a loan from the 2nd defendant to purchase machinery worth $454,428 from the 1st defendant and that the 2nd defendant gave him a full loan for the purchase but

again had to admit that the machinery was a depreciating asset and that generally a bank or finance company would never give a loan at full value on a depreciating asset but that a lease arrangement would cover the full value. I must revert to the evidence of PW2 that he put in the 1st plaintiff's audited accounts 'lease rental' because it appeared as such in the 1st plaintiff's account books and was rental for the lease of machinery and that he was not told by the 2nd plaintiff this amount was for the repayment of a loan and neither did this amount appear in the 1st plaintiff's books as repayment of a loan, and in contrast he testified in relation to an entry of a loan to the 1st plaintiff from Malaysian Industrial Development Finance Berhad that this was interest for a loan and where there was a loan it was so stated. He went on to add that when he put in the item 'lease rental' he consulted the 2nd plaintiff who told him it was rental and not repayment of a loan. I have also adverted to several documents which expressly refer to a 'lease' and 'lease rentals' and now proceed to refer to some more. The 1st plaintiff also wrote to the 2nd defendant on October 23, 1975 enclosing a cheque for the first payment of 'the first monthly lease rental'. This was followed by another letter on November 24, 1975 from the 1st plaintiff to the 2nd defendant headed 'Leasing Facility' and requesting a deferment for the payment of the second monthly instalment for the lease of the machinery under the lease agreement. After the termination of the lease agreement by the 2nd defendant on March 3, 1976 and in the course of negotiations to save the situation, the 1st plaintiff wrote to the 1st defendant's solicitors on May 11, 1976 under the heading 'Lease of sawmill equipment from (the 2nd defendant)' and that letter clearly distinguishes hire-purchase from leasing facility and again these two on the one hand and a loan on the other and also between lease rental and repayment of a fixed loan. It is moreover not without significance that this letter makes no claim to ownership of the machinery or that the arrangement entered into was for a loan and not a lease.

The case for the defendants is that this is a perfectly ordinary and straightforward case of lease financing amply supported by the documentary evidence and oral testimony adduced on their behalf. After the termination of the lease and repossession of the machinery the 1st defendant was obliged to pay the 2nd defendant all moneys due to it. As a result the 1st defendant obtained finance for this purpose from Mortgage And Finance (Malaysia) Berhad, and according to DW2 this was done by selling the machinery to the latter and taking it back by way of a lease agreement. DW1 said that it was agreed between the 1st defendant and the plaintiffs that the machinery was only to be installed after the signing of the contract documents between the 1st plaintiff and the finance company with whom they were going to deal, and Mr. Rajah in his concluding submission agrees that the plaintiffs were taking a risk in installing the machinery and went on to cautiously concede that technically there was a breach of the leasing agreement for non-payment of the lease rentals. I should perhaps also add here that Mr. Rajah put to DW2 in cross-examination and he agreed in answer to a specific question by counsel to this effect that the 2nd defendant was the owner of the machinery until the 1st defendant had made payment of all moneys due to the former as a result of the termination of the lease. It is beyond the parameters of comprehension as to how this could be so if indeed the 1st plaintiff was the owner of the machinery and the arrangement entered into was not lease financing but a loan on the security of the machinery as the plaintiffs contend.

DW3 said that in April 1975 she received a telephone call from a Mark Ali of Malaysian Industrial Development Finance Berhad, Ipoh, regarding an enquiry about a leasing possibility and as a result the 2nd plaintiff came to see her in Kuala Lumpur and indicated that he would like to expand his sawmill operations and had in mind to lease some machinery from the 2nd defendant. She said she was not shown any documents and intimated that the 2nd defendant would be interested to consider his proposals and asked for his profit forecasts and balance sheet and also told him the 1st defendant would have to guarantee the lease payments and purchase the machinery. After several meetings with the 2nd plaintiff and receiving the data asked for and contacting the 1st defendant, she and DW4 visited the sawmill in May 1975 and on her return she put up a memorandum (M15) recommending the application for a lease in accordance with the heads of terms appearing therein. Her recommendation was accepted by the management committee and approved by the chairman of the 2nd defendant. Then firm offers in writing setting out the terms and conditions therefor were made to the 1st plaintiff and the 1st defendant by letters written on June 2, 1975, copies of which they signed in confirmation. She said that there was no objection by the 2nd plaintiff to any of the terms which he confirmed by signing in her presence. The 2nd defendant's solicitors were then instructed to prepare the necessary documents and a draft lease agreement was sent to the 1st plaintiff on July 11, 1975 for comments or approval as the case may be. There were no comments and the lease agreement was duly executed in terms of the draft. The 1st plaintiff did not assert any claim to be the owner of the machinery. She said that in the terms of the offer to the 1st plaintiff on June 2, 1975 it was clearly stated that the 1st defendant was to purchase the machinery upon premature termination of the lease agreement and that there was no option to the 1st plaintiff to purchase the machinery and the plaintiffs never objected to these conditions. I would pause here to say that I totally reject the evidence of the 2nd plaintiff that the 2nd defendant had proposed that it would give an option for $1 to the 1st defendant who in turn would give a similar option for the same amount to the 1st plaintiff to purchase back the machinery and that he agreed to this proposal as he had no alternative. DW3 denied this and the documents produced speak otherwise and the 2nd plaintiff had to admit a little later in his evidence that this proposal regarding an option which he spoke of did not ultimately form one of the terms agreed between the 2nd defendant and himself.

DW3 denied that during the negotiations for the lease she used the word 'loan' to describe the facility given to the 1st plaintiff. She explained that if the

2nd plaintiff had come to the 2nd defendant for a loan she personally would not have handled the request or application as her department, the investment department, in 1975 would not and could not handle applications for loans since the 2nd defendant had a loans department at that time. She went on to say that she was familiar with the 2nd defendant's policy with regard to granting loans and that if the 2nd plaintiff had asked for a loan to purchase the machinery the 2nd defendant would not have granted the loan because as a matter of policy the 2nd defendant does not grant loans for machinery at full value. She added that the 2nd defendant would ask for a security margin of fifty per cent and this would have defeated the plaintiffs' purpose in getting a loan because they would get only half of what they wanted. She said that it was finance by leasing that was discussed throughout the negotiations and the 2nd plaintiff never at any stage told her that he was interested in getting a loan for the purpose of purchasing the machinery or that he had already bought the machinery. I find her evidence and explanations for the reasons given eminently reasonable and plausible and see no reason to disbelieve her.

DW4 whose evidence corroborates that of DW3 said that in none of his meetings with the 2nd plaintiff did the latter claim ownership of the machinery or intimate that part of the machinery had already been delivered to the sawmill. He said that there was no option to the 1st plaintiff to purchase the machinery and this was explained to the 2nd plaintiff, and that the 2nd defendant was advised by its tax accountant that if an option was given to the lessee the Inland Revenue Department might consider such a transaction as one of hire-purchase in which event the tax effect on rentals and capital equipment would be treated differently. He went on to say that leasing would be more advantageous to the 1st plaintiff than to take a loan if it could get one as lease rentals were wholly deductible by the 1st plaintiff for income tax purposes, whereas if the 1st plaintiff had bought the machinery all it could claim would be for capital depreciation by way of capital allowances which would not be as attractive or beneficial as a total write-off of lease rental payments for tax purposes. He said that after the second visit he and DW3 made to the 1st plaintiff's sawmill in February 1976, he put up a memorandum (M17) to the management committee of the 2nd defendant recommending the termination of the lease for the reasons therein given and a request to the 1st defendant as guarantor to indemnify the 2nd defendant for all losses incurred.

In the circumstances on a consideration of the evidence adduced both oral and documentary and for the reasons I have stated, I find no substance whatsoever in the contention of the plaintiffs that the 1st plaintiff was at any time the owner of the machinery in question or that the arrangement entered into to provide finance to the 1st plaintiff was otherwise than what the documents produced *tales quales* show it to be, namely, the provision of lease financing to the 1st plaintiff by the 2nd defendant by way of a lease of the machinery to the former by the latter which had purchased it from the 1st defendant. The crux of the plaintiffs' claim to the effect that the documents are a sham because they were a device to cover a transaction whereby goods were given as security for a loan must accordingly fail. *Cadit quaestio,* and it follows that the plaintiffs' ancillary claims for damages and other relief must necessarily succumb, and it is perhaps only necessary for me to observe that in the matter of the plaintiffs' claim for damages Mr. Rajah himself had to admit that they have not satisfactorily proved every item of the damages sought.

It is now necessary to turn to the 1st defendant's counterclaim against the 1st plaintiff. The 1st defendant counterclaims, first for the sum of $527,039.37 which it was required to and did pay to the 2nd defendant in consequence of the default of the 1st plaintiff under the lease agreement and the termination thereof and second, for $165,660.73 being the loss and expenses in addition thereto which the 1st defendant itself had suffered, less moneys recovered from the plaintiffs and realised from the sale of the machinery in the sum of $277,128. With regard to the amount payable to the 2nd defendant the 1st defendant was by a letter dated March 22, 1976 presented with the alternative of either paying $483,244.43 as the cash price for settlement on April 1, 1976 or $533,985.10 as the price for deferred settlement on April 1, 1977. The 1st defendant opted by a letter dated April 3, 1976 for the second alternative. DW2 explained that the reason for this election to pay a year later was to give the 1st plaintiff as much time as possible to raise finance so that the 2nd defendant could be paid off so as to obviate the necessity for repossessing the machinery, and also because in 1976 there was a recession and the 1st defendant was short of cash and not in a convenient position to pay the requisite amount.

DW1 and DW2 gave evidence at some length of the efforts made by the 1st defendant to dispose of the machinery after repossession and explained how and why the disposal was effected at the prices they were ultimately sold for; all this has been adequately established to my satisfaction. DW2 also produced a statement of account (L14) tabularized to verify the amount claimed by the 1st defendant by reference to the relevant documentary evidence in the several agreed bundles of documents, and again I must say that the quantum of the counterclaim (subject to adjustment in one respect which I shall refer to in a moment) has been fully proved and substantiated. DW4 explained in his evidence how the amount claimed from the 1st defendant was calculated in the annexure to the 2nd defendant's letter of March 22, 1976 and in particular the item relating to rebate on surplus of total payments over purchase price for early termination, and he added that the figure for surplus of total payments over purchase price was arrived at from the formula in the Hire-Purchase Act, 1967 for statutory rebate. He went on to say that though this was not a hire-purchase transaction this formula is adopted in financial circles because it is quite an accurate estimate of the value of money repaid at an earlier date and is generally used for leasing rebates. He further said that the amounts claimed were under the provisions of clause 9 of the general conditions of leasing in the second schedule to the lease agreement.

By virtue of the purchase of the machinery by the 2nd defendant from the 1st defendant, the lease agreement between the 2nd defendant and the 1st plaintiff and in particular clauses 1 to 4 thereof and clauses 8, 9 and 12 of the conditions of leasing in the second schedule thereto relating to termination and the amounts recoverable by the 2nd defendant from the 1st plaintiff, the guarantee executed by the 1st defendant in favour of the 2nd defendant and the charges executed in favour of the 1st defendant and in particular clause 1 thereof pursuant to the agreement of April 25, 1975 between the 1st defendant and the plaintiffs and indeed by the operation of the provisions of section 93 of the Contracts Act, the 1st defendant has all the rights of the 2nd defendant to claim recoupment. The 1st defendant did in fact pay the 2nd defendant the sum of $527,039.37 on February 11, 1977, a lesser amount than the $533,985.10 originally intended because no doubt of the accelerated payment some two months earlier than agreed upon. The 2nd defendant and in turn the 1st defendant is entitled to recover all loss naturally arising as a result of the breach of contract on the part of the 1st plaintiff according to the rule in *Hadley* v. *Baxendale*[3] which is statutorily crystallized in section 74 of the Contracts Act. The 1st defendant is entitled to claim the interest payments made to Mortgage and Finance (Malaysia) Berhad from which it had to borrow moneys to pay the 2nd defendant (*Ex parte Bishop, In re Fox, Walker & Co.*[4] (at pages 421-422); *Omnium Insurance Corporation, Limited* v. *United London and Scottish Insurance Company Limited*[5] (at page 387)). The 1st defendant is also entitled to claim, as it does, to recover for any damages or loss sustained by it beyond what it had to pay to the 2nd defendant under the guarantee (*Badeley* v. *Consolidated Bank*[6] (at page 556). These cover such items in the counterclaim as fire insurance premium, store rental, transport charges and expenses involved in repossessing the machinery.

It is true that under clause 2 of the agreement of April 25, 1975 between the 1st defendant and the plaintiffs the former had agreed to guarantee the payment by the 1st plaintiff of all moneys payable to either C.C.M. or the 2nd defendant pursuant to the lease agreements to a limit of $454,428 but this does not necessarily in my view preclude the 1st defendant from guaranteeing beyond that limit for a larger sum, and there appears to be nothing in the agreement to prohibit this if it became necessary. It was made abundantly clear to the plaintiffs right at the outset and specifically by the terms of the written offer of June 2, 1975 from the 2nd defendant to the 1st plaintiff that the former stipulated for a complete guarantee from the 1st defendant. With reference to the matter of an adjustment to the quantum of the counterclaim by the 1st defendant I have mentioned earlier, Mr. Mooney concedes that in calculating the amount of the counterclaim the 1st defendant has erred in not deducting interest on the sum of $59,635 which is the aggregate of the amounts received from the plaintiffs and realised from the sale of the machinery on August 2 and October 24, 1976. The amount of interest in respect of this sum is $12,523.35 which must therefore be subtracted from the claim made for interest for $110,078.63. The counterclaim in the sum of $415,572.10 must accordingly be diminished by $12,523.35 included in error and the total sum now claimed should therefore be $403,048.75.

Mr. Rajah however contends that the 1st defendant was not entitled to agree to pay the 2nd defendant $533,985.10 on April 1, 1977 or to pay as it did $527,039.37 because of accelerated payment on February 11, 1977, arguing that the only liability that had arisen under the lease agreement was the default of the 1st plaintiff in paying lease rentals for three or four months and that in doing so the 1st defendant was not discharging any obligation under the guarantee it had executed in favour of the 2nd defendant and that accordingly the amount claimed in the counterclaim is wholly unjustified. He submits that where an owner terminates a hire-purchase agreement for breach of terms by the hirer the general rule is that the owner is only entitled to damages for arrears of instalments due at the date of termination, interest and other expenses such as for repossession, and relies principally on *Financings Ltd.* v. *Baldock*[7] and other cases applying it. I think that *Financings Ltd.* v. *Baldock*[7] can be clearly distinguished on the facts and has no application in the circumstances of the matter before me. In that case there was no such provision as clause 9 of the general conditions of leasing in the second schedule to the lease agreement, the proviso whereto reads:

> "Provided that nothing herein contained shall prejudice the right of the Owner in the event of termination of the hiring by the Owner under Clause 9 hereof to recover from the Hirer all rent and any other moneys payable hereunder due at the date of such termination and all damages which the Owner shall have suffered by reason of or arising out of such termination."

Mr. Rajah admits in answer to a question I put to him that he is unable to find any authority involving a similar provision.

The case before me is one of leasing and not hire-purchase. I agree with Mr. Royan for the 2nd defendant that because of the failure of the plaintiffs to plead that it was the 2nd defendant which repudiated the lease agreement and not the 1st plaintiff the 2nd defendant has been unable to lead evidence to show that it was in fact the 1st plaintiff which had repudiated, assuming for a moment that the principle in *Financings Ltd.* v. *Baldock*[7] is applicable to a case of leasing in general and in particular to the instant matter in spite of the provisions of clause 9 of the general conditions of leasing. Again, in *Financings Ltd.* v. *Baldock*[7] there was a provision for termination by the hirer but in the case before me it is very clear that there was a lease for a fixed term of five years with no power for prior termination by the 1st plaintiff. There would also appear to be some evidence in the memorandum (M17) drawn up by DW4 that the 1st plaintiff evinced an intention to repudiate the lease agreement, and this was not challenged by the plaintiffs.

I should perhaps also before laying to rest Mr. Rajah's submission on the entitlement of the 2nd defendant on the termination of the lease agreement in reliance on principles applicable to hire-purchase agreements point out that on this argument the 2nd

defendant which had purchased the machinery from the 1st defendant for $454,428 would only have been entitled to recover from the 1st plaintiff as a result of the termination in addition to $45,442.80 payable to it on the sale of the machinery to the 1st defendant pursuant to their agreement of September 19, 1975: (a) arrears of the rentals then due amounting to some $40,000 odd, (b) interest which would be negligible, and (c) expenses incurred such as for repossession which would only be a reimbursement — a loss of such magnitude as not to have conceivably been within the intention of the parties and such as to make the transaction farcical from the 2nd defendant's point of view. The 2nd defendant might if Mr. Rajah's contention can be sustained perhaps be forgiven in these circumstances if it attempted, no matter rightly or wrongly, to implore and invoke the intervention of equity!

Mr. Rajah addressing me on the question of mitigation of damages submits that in the circumstances the 2nd defendant should not have determined the lease agreement and that such a step was unreasonable as it was aware that this would lead to tremendous loss and it had in any event an easy remedy available by way of recourse to the 1st defendant for payment under the guarantee. All I need say in this connection is that this would have meant in the face of the evidence before me the total assumption of all liability by the 1st defendant for all payments under the lease agreement for an indefinite period of time in the forseeable future in the light of the contents of the memorandum (M17) prepared by DW4 which did not come under attack in cross-examination. Mr. Rajah can only say regarding this in his final address that the recommendation in the memorandum (M17) was not reasonable taking all the circumstances into consideration. I regret I am unable to comprehend the import of this argument in view of the evidence. I find no merit or substance either in his contention that the lease agreement would amount to a snare if the 1st plaintiff is liable to pay for the loss of profits to the 2nd defendant as it contained no minimum payment clause and there is no indication from the 2nd defendant of the ultimate amount it could or would claim. I have already considered the liability of the 1st plaintiff under the relevant documents and in particular the lease agreement and the general conditions of leasing contained in the second schedule thereto. Mr. Rajah agrees that he finds it difficult to contend in view of the authorities I have referred to that the 1st defendant is not entitled to the interest payments made if it is entitled to claim the amount it has paid to the 2nd defendant.

As to the claim for the expenses involved in repossessing the machinery, Mr. Rajah says that this might have been claimed by the 2nd defendant in which event the plaintiffs might not have been able to resist it but that the 1st defendant has no right to claim this amount from the 1st plaintiff as the 1st defendant was only acting as an agent for the 2nd defendant for the purposes of repossession. The 2nd defendant requested the 1st defendant by a letter dated March 3, 1976 'to act as our agent for the repossession and subsequent sale of our equipment' and the 1st defendant consented to this arrangement by signing and returning a copy of that letter. The 1st defendant's claim for repossession expenses would therefore eliminate a circuity of claims as otherwise what would initially have started off as a claim by the 1st defendant against the 2nd defendant would ultimately and somewhat circuitously resolve into a claim by the 1st defendant against the 1st plaintiff as the counterclaim now seeks to do. I cannot agree with Mr. Rajah's objection to the items claimed by the 1st defendant for fire insurance premium, store rentals and loading and transport charges on the ground that these expenses were incurred after repossession and before disposal as they are intricately connected with the termination of the lease agreement by the default of the 1st plaintiff and come squarely within the provisions of section 74 of the Contracts Act. There is however some substance in the point Mr. Rajah makes with regard to the item pertaining to legal fees paid to Lewis & Co., the solicitors for the 1st defendant, as this purports to include part of the costs of this action according to the bill therefor issued on December 20, 1977 but Mr. Rajah *proprio motu* agrees this item can be adjusted on taxation if the 1st defendant succeeds on its counterclaim.

In the event I dismiss the plaintiffs' action against both defendants with costs, and enter judgment with costs for the 1st defendant on its counterclaim against the 1st plaintiff in the sum of $403,048.75. There is a prayer in the 1st defendant's counterclaim for interest on the amount claimed but I have not been addressed on this. If the 1st defendant wishes to pursue this claim for interest, I will now hear argument as to whether I should exercise my discretion in this regard and if so the appropriate rate and period therefor.

Order accordingly.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Lewis & Co.; Shook Lin & Bok.*